STATE OF MICHIGAN

COURT OF APPEALS

LORRAINE JACKSON,

Plaintiff-Appellant,

v

MARILYN LORENCE and TAUBMAN COMPANY LIMITED PARTNERSHIP, d/b/a TAUBMAN COMPANY,

Defendants-Appellees.

UNPUBLISHED
October 9, 2001

No. 222798
Oakland Circuit Court
LC No. 98-007394-CL

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting defendants' motions for summary disposition of her claims under the Civil Rights Act, MCL 37.2101 *et seq.*, the Handicapper's Civil Rights Act (HCRA), MCL 37.1101 *et seq.*,[1] and the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, as well as plaintiff's claim for intentional infliction of emotional distress. We affirm.

Plaintiff is an African-American female who was employed by defendant Taubman Company beginning in 1987. Defendant Lorence was plaintiff's supervisor. In August 1995, plaintiff went on a medical leave of absence because of depression and anxiety. Plaintiff submitted several notes from two different psychiatrists extending her disability. When she did not return to work after 180 days, her employment was terminated pursuant to a company policy that required termination after 180 days of non-job-related disability leave if the employee was unable to return to work.

I. HCRA and ADA claims

Plaintiff now argues that the trial court erred in finding that she was not a "handicapper" within the meaning of the HCRA, or a "qualified person with a disability" within the meaning of the ADA. We disagree. The HCRA prohibits forms of employment discrimination and requires

[1] The HCRA is now known as the Persons with Disabilities Civil Rights Act.

that reasonable accommodations be made to assist handicapped individuals in performing the duties of their employment. *Tranker v Figgie Int'l, Inc (On Remand)*, 231 Mich App 115, 122; 585 NW2d 337 (1998). To establish a prima facie case of discrimination under the HCRA, the plaintiff must establish (1) she has a "handicap" as defined by the HCRA, (2) the handicap is unrelated to her ability to perform the duties of a particular job, and (3) she was discriminated against in one of the ways described in the statute. *Kerns v Dura Mechanical Components, Inc (On Remand)*, 242 Mich App 1, 12; 618 NW2d 56 (2000).

Similarly, the ADA "was enacted to protect against discrimination in employment, including hiring, firing, and advancement." *Tranker*, *supra* at 118, citing *Swanks v Washington Metropolitan Area Transit Authority*, 325 US App DC 238; 116 F3d 582 (1997). "The protection afforded by the ADA extends to disabled individuals who can perform the essential functions of the employment position that they hold or desire with or without reasonable accommodation." *Id.* A "qualified individual with a disability" under the ADA is

> one who satisfies the requisite skill, experience, education, or other work-related requirements of the job and who can perform its essential functions with or without reasonable accommodation. 42 USC 12111(8). Simply put, the ADA does not cover all disabled persons, but only those who can perform their jobs' essential functions with the aid of reasonable accommodation. [*Collins v Blue Cross Blue Shield of Mich*, 228 Mich App 560, 570; 579 NW2d 435 (1998).]

In the present case, the trial court correctly determined that plaintiff did not qualify for protection under either of these statutes. According to plaintiff's deposition testimony, the two psychiatrists who treated her wanted her to remain away from work, and neither released her to return to work or indicated that any accommodations would allow her to return. Further, plaintiff made representations to the Social Security Administration and the Bureau of Workers' Compensation that she had been unable to work since August 3, 1995, and could not perform the functions of her job with defendant or of any job. Therefore, her condition was directly related to her ability to perform her job.[2] Although plaintiff submitted an affidavit indicating that she was willing to attempt to return to work, she could not create a question of fact by making statements in a later affidavit that contradicted her earlier deposition testimony. *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 234; 477 NW2d 146 (1991). Because plaintiff was not a handicapped person or a qualified person with a disability, defendant Taubman had no duty to accommodate plaintiff. Accordingly, the trial court properly granted defendant summary disposition of plaintiff's claims under the HCRA and the ADA.

Plaintiff argues that her depression and anxiety are unrelated to her ability to perform the duties of her job with Taubman and contends that her second psychiatrist, Dr. Kafi, documented that she could return to work on February 16, 1996. However, the note from Dr. Kafi does not

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[2] Plaintiff correctly argues that the receipt of social security benefits does not automatically bar a subsequent claim under either the HCRA or the ADA. However, statements made in application for disability benefits may be weighed against a plaintiff in a subsequent handicap discrimination claim. *Tranker*, *supra* at 122-123.

specify that plaintiff could return to work and is in the same format as previous notes extending her disability. Given that defendant did not have a duty to accommodate plaintiff, because she was not able to return to work during the 180-day period, this note alone did not trigger any further duty on defendant's part.

Plaintiff also contends that defendant Taubman should have considered her leave of absence to be "job-related." Under the January 1995 Illness and Disability Policy that was in effect when plaintiff first began her leave of absence in August 1995, the employer paid for a maximum of 180 disability days for a non-job-related injury in a twelve-month period. The policy provided that if an employee was unable to work after that time, "your employment will be terminated and you may become eligible for coverage under the Long-Term Disability (LTD) insurance policy." The policy defined a "job-related injury" as one for which an employee was receiving workers' compensation insurance benefits. We agree with the trial court that, under the plain language of Taubman's policy, plaintiff's condition was not job-related because she did not receive workers' compensation benefits during her absence and did not even file a workers' compensation claim until April 1996, more than two months after her employment was terminated. Plaintiff's argument that a diagnosis indicating that her anxiety was induced by stress on the job transformed her disability into one that was job-related under defendant's policy has no merit.

Plaintiff next argues that the trial court erred when it concluded that she did not request accommodation and that defendant Taubman had no duty to accommodate her. However, because plaintiff was not handicapped within the meaning of the HCRA, Taubman had no duty to accommodate her. Further, the trial court correctly found that plaintiff never requested accommodation, instead insisting throughout her leave of absence that she was unable to perform the functions of her job. Although plaintiff now contends that she produced a "vast amount of evidence" that she requested accommodation directly, she has not identified a specific document in which she makes this request. The statements from her physicians each seek to extend her leave of absence because plaintiff was unable to work. The duty to make "reasonable accommodation" under the HCRA does not extend to granting the plaintiff a medical leave until such time as she would be able to perform the requirements of his job. *Kerns*, *supra* at 16.[3]

The trial court also correctly determined that defendant's Illness and Disability Policy was not discriminatory. A written policy of an employer purporting to require discharge in a certain circumstance that is facially neutral can stand as a shield against claims of discriminatory discharge so long as the employer establishes that the policy is applied uniformly without exceptions. *Lamoria v Health Care & Retirement Corp*, 233 Mich App 560, 562; 593 NW2d 699 (1999), adopting the reasoning of the previously vacated decision in 230 Mich App 801, 811-812; 584 NW2d 589 (1998). Here, the testimony of Taubman's Employee Relations Vice

[3] Similarly, plaintiff's argument that the trial court erred in granting summary disposition to defendant Lorence on plaintiff's HCRA claim, because individual managers can be held liable under the act, is without merit. Plaintiff is not a handicapper within the meaning of the act, and the trial court properly found that she is not eligible for protection under the act. Furthermore, the undisputed evidence established that Taubman's human resources personnel, not Lorence, performed the ministerial duties associated with plaintiff's leave of absence.

President Robert Cleary was that plaintiff's employment was terminated automatically by application of the Illness and Disability Policy when she did not return to work after 180 days of her medical leave of absence, and that Taubman strictly adhered to this rule. Therefore, the policy was not discriminatory, and the trial court did not err in concluding that plaintiff's employment was lawfully terminated.

II. CRA claim

Next, plaintiff argues that the trial court erred in granting summary disposition to defendants on plaintiff's claim under the Civil Rights Act. The CRA prohibits race discrimination in employment decisions, providing:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a).]

A plaintiff may establish a prima facie case of discrimination under the CRA by showing that she was:

> (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. [*Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).]

If the plaintiff establishes a prima facie case, a presumption of discrimination arises that the defendant may rebut by articulating a legitimate, nondiscriminatory reason for the employment decision. *Town*, *supra* at 695-696. If the employer rebuts the presumption of discrimination, the plaintiff must then raise a triable issue that the stated reason for the adverse employment decision was merely pretext for discriminatory animus. *Id.* at 696-697.

Plaintiff claimed that she was not placed in job positions for which she was qualified while less qualified Caucasian employees obtained these positions, that she was not promoted while less qualified coworkers with less seniority were promoted, that she was given adverse work assignments, that her attendance and job performance was scrutinized in an unusual and unreasonable manner, and that she was harassed because of her race. She also claimed that race played a role in her eventual termination from employment and noted that she was replaced by a Caucasian male. Plaintiff maintained that she sought placement in the positions of Senior Assistant Lease Administrator, Benefits Clerk, Benefits Specialist, and Insurance Coordinator, and that she had the required education and skills for these positions, which went to Caucasian employees. The trial court determined that plaintiff presented a prima facie case of discrimination, because she showed that she did not receive promotions that went to Caucasian employees. However, the court also determined that defendants met their burden of providing a

nondiscriminatory reason for not giving these positions to plaintiff because she did not meet the criteria of prior pertinent experience and good job performance.

We agree that that plaintiff did not meet the burden of proving that the legitimate nondiscriminatory reasons offered by Taubman were merely pretexts for discrimination. Regarding the Senior Assistant Lease Administrator position, plaintiff contended that she had the posted qualifications, including a four-year college degree, and asserted that she had good job performance and expected to be promoted. She was the only African-American employee in the Lease Administration Department. Plaintiff maintained that almost all of the Caucasian employees in her department were promoted during the department's 1989 reorganization, while she was not. However, according to defendant's uncontroverted evidence, only six of the twenty employees in the department received promotions, while plaintiff and the thirteen remaining Caucasian employees did not. Plaintiff also challenged defendant's hiring of an allegedly less qualified Caucasian applicant for the position of Benefits Clerk, and the transfer of Caucasian employees to the positions of Benefits Specialist and Legal Services Coordinator. However, defendant explained that plaintiff had minimal benefits experience while the successful applicant for the Benefits Clerk position had previously worked as a human resources assistant, specializing in benefits administration and human resource information systems, and the employee transferred to the Benefits Specialist position had held various positions within the Human Resources Department over a period of six years. The employee transferred to the position within the Legal Services department had received "admirable" performance evaluations for the preceding three years, which made her more qualified for the position than plaintiff. Plaintiff presented no evidence to show that defendant's explanation of its nondiscriminatory motives was merely pretext for discrimination, and the trial court did not err in granting summary disposition on these claims.

Plaintiff also alleged that she was subjected to disparate treatment based upon her race with respect to adverse work assignments and closer scrutiny of her work than Caucasian employees. In opposing defendants' motion for summary disposition, plaintiff argued that, during the six months before her disability leave, she was "bombarded" with additional work, required to inform her supervisor by e-mail of her arrival and departure times, and had false memos regarding her work performance and conduct placed in her personnel file. Although plaintiff maintained that defendants' conduct was done to discriminate against her and harass her, plaintiff presented no evidence to show that Caucasian employees in her department were treated differently and came forward with nothing but her own speculations about defendant's motives in evaluating her work performance. As the trial court found, "plaintiff's assumptions and conclusions about the work performed by and the supervision of other employees are insufficient to establish disparate treatment."

To the extent that plaintiff argues defendant's conduct during the month prior to her disability leave resulted in a hostile work environment, that claim also fails.[4] The elements

[4] We note that our Supreme Court has declined to decide the issue whether a valid claim of hostile work environment can be made based on conduct or communication that is "not of a sexual nature." *Quinto v Cross & Peters Co*, 451 Mich 358, 368; 547 NW2d 314 (1996). But see *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621; 576; NW2d 712 (1998) (continued…)

necessary to prove a prima facie case of discrimination based on hostile work environment include:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of [her protected status]; (3) the employee was subjected to unwelcome ... conduct or communication [involving her protected status]; (4) the unwelcome ... conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. MCL § 37.2103(h); 37.2202(1)(a); MSA § 3.548(103)(h); 3.548(202)(1)(a). [*Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

Plaintiff cites several alleged incidents that she claims establish she was subjected to a hostile work environment during the months preceding her medical leave. Only two of those instances arguably related to plaintiff's race. None relate to her disability. Plaintiff claims that while discussing the Malice Green murder trial, defendant Lorence made the statement "they always cry racism when things don't do their way." Also, plaintiff claims that upon arriving to work with a new hairstyle, defendant Lorence stated: "Here comes Whoopi Goldberg" and described the hairstyle as "worms coming out of her head." While the statements attributed to defendant Lorence evidence a degree of insensitivity and ignorance, we cannot say that under the totality of the circumstances, the alleged conduct rose to the level of creating a hostile work environment. *Quinto, supra* at 369.[5]

III. Intentional infliction of emotional distress claim

Finally, plaintiff argues that the trial court erred in granting summary disposition of her claim for intentional infliction of emotional distress. This tort has four elements: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996). "Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). "Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985), quoting Restatement Torts, 2d, § 46, comment d, pp 72-73. In reviewing a claim of intentional infliction of emotional distress, the court must determine whether the defendant's

(…continued)

(involving a hostile work environment claim based on alleged age and handicap discrimination).

[5] Given defendant's legitimate, nondiscriminatory reasons for promoting Caucasian employees to the positions that plaintiff sought, we do not consider plaintiff's failure to gain promotion as a factor contributing to a hostile work environment.

conduct is sufficiently unreasonable as to be regarded as extreme and outrageous. *Doe*, *supra* at 92.

Plaintiff alleged that defendant Lorence caused her to suffer extreme emotional distress through conduct that was extreme and outrageous so as to offend a reasonable person, reckless, and done with the intent of causing plaintiff extreme humiliation. While some of the allegations, if proven, were racially insulting, the evidence establishes that plaintiff did not complain about the alleged conduct when it occurred and could not specify when it occurred. Only after defendant Lorence began a plan to improve plaintiff's work performance did plaintiff complain. Further, Lorence's assessment of plaintiff's work performance was undertaken as part of Lorence's duties as plaintiff's supervisor and plainly is not the type of conduct that would lead to liability for the intentional infliction of emotional distress. The trial court did not err in granting summary disposition to defendants on this claim.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Brian K. Zahra